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IN THE

Supreme Court of the United States

October Term, 1959.

No. 49

Florida Lime and Avocado Growers, Inc., a Florida corporation, and South Florida Growers Association, Inc., a Florida corporation,

Appellants,

vs.

W. C. Jacobsen, Director of the Department of Agriculture of the State of California, *et al.*,

Appellees.

Appeal from the United States District Court for the Northern District of California, Northern Division.

APPELLANTS' BRIEF

Opinion of district court*

The opinion of the three-judge district court is reported in 169 Federal Supplement at page 774.

Grounds on which jurisdiction of this court is invoked

Jurisdiction of this court is invoked pursuant to 28 U. S. C. section 1253, providing for the direct appeal to this court from a judgment of a three-judge district court, convened pursuant to 28 U. S. C. sections 2281 and

*R. 80; also Appendix I, *infra*, Ap. 1.

2284, in an action to restrain further enforcement of a state statute alleged to contravene provisions of the federal constitution. (Notice of appeal, R. 104.)

Nature of action and statutes pursuant to which it is brought: The object of the action is to restrain further enforcement against appellants, by the state officers of California, of section 792 of the Agricultural Code of California, prescribing the standard for avocados that may lawfully be marketed in that state and providing in particular that all such avocados, at the time of picking and all times thereafter, shall contain not less than 8% of oil. (R. 10; also Appendix II, *infra*, Ap. 10.)

Appellants are handlers of avocados grown in Florida and since June 11, 1954 have been operating under a federal marketing agreement regulating the marketing of avocados grown in South Florida, then put into effect by order of the Secretary of Agriculture pursuant to authority given to him by Congress in the Agricultural Marketing Agreement Act of 1937. (Marketing Agreement Act, Appendix III, *infra*, Ap. 11; Secretary's Marketing Order No. 69, R. 19; Complaint, paragraphs IV to XIII, R. 5-9.) Appellants complain that even though most of the avocados handled by them in interstate commerce contain less than 8% oil or fat, they are as wholesome as avocados with greater oil content; that shipments of avocados in interstate commerce are made only after inspection by the joint inspection service of the state of Florida and the federal government and certification that the avocados meet the standards of maturity and quality prescribed by the Secretary of Agriculture under the federal marketing agreement; that appellants are greatly restricted in their efforts to market their fruit in California by the provision of the challenged statute barring sale in

that state of avocados with less than 8% oil content, a requirement alleged to be arbitrary and discriminatory as applied to Florida-grown avocados with less than 8% oil content. (Complaint, paragraphs XXII to XXXI, R. 12-16.)

The complaint invokes jurisdiction of the district court under both sections 1331 and 1337 of the Judicial Code (28 U. S. C. sections 1331 and 1337) and prays for a hearing by a three-judge court as provided by sections 2281 and 2284 of the Judicial Code (28 U. S. C. 2281 and 2284). (Complaint, paragraphs III, IV, XXVIII, XXIX, XXX, XXXII, R. 5, 14-17.)

Date of judgment and of notice of appeal: The judgment of the district court, dismissing the action for want of jurisdiction, was entered January 13, 1959, and notice of appeal was filed February 12, 1959 in the office of the clerk of the United States District Court for the Northern District of California, Northern Division. (R. 93, 104.)

Constitutional provisions and statutes involved: The complaint is based upon section 8(3) of article I of the United States Constitution, empowering Congress to regulate commerce with foreign nations and among the several states, and the provision of section 1 of article XIV of amendments that no state shall deny to any person within its jurisdiction the equal protection of the laws. The complaint alleges that enforcement against appellants of the challenged state statute nullifies the exercise of power by Congress to regulate interstate commerce, by enactment of the Agricultural Marketing Agreement Act of 1937, thus involving the supremacy provision of the constitution, section 2 of article VI.

The opinion of the district court refers to section 2 of article III of the constitution, stating the extent of the judicial power of the United States.

The California statutes involved are section 792 of the Agricultural Code, also the enforcement provisions, sections 784, 785 and 785.6, set forth in Appendix II, *infra*, Ap. 6-10. The federal statute involved is the Agricultural Marketing Agreement Act of 1937, Appendix III, *infra*, Ap. 11-17.

Cases sustaining jurisdiction: Appellants, in their jurisdictional statement, cited *Evers v. Dwyer*, 358 U. S. 202, 79 S. Ct. 178, and *Doud v. Hodge*, 350 U. S. 485, 76 S. Ct. 491, 354 U. S. 457, 77 S. Ct. 1344. In *Evers v. Dwyer*, an action for declaratory judgment asserting the constitutional right of the Negro plaintiffs to travel on buses without being segregated, dismissed by the three-judge district court on the ground that no actual controversy had been shown, this court entertained the appeal and reversed the judgment. In *Doud v. Hodge*, wherein the plaintiffs sought to enjoin enforcement against them of the Illinois Community Currency Exchanges Act, on the ground that it denied to them equal protection of law in violation of the Fourteenth Amendment, the three-judge district court dismissed the complaint for lack of jurisdiction and this court vacated the judgment and remanded the case to the district court for further proceedings. Additional cases sustaining jurisdiction of both this court and the district court will be cited in the argument.

Question presented for review

The question for review is whether the district court erred in dismissing the action, without a trial on the merits, for alleged lack of a present controversy cognizable by the court within its constitutional jurisdiction.

Statement of the case

In the decade preceding June 11, 1954, when the Secretary of Agriculture issued his *Florida Avocado Order 69*, under the Agricultural Marketing Agreement Act of 1937, there was a sharp increase in the commercial production of avocados in the southern counties of Florida, giving rise to urgent need for regulated marketing. To this end, the growers and handlers of the Florida avocados proposed adoption by the Secretary of Agriculture of a marketing agreement putting into effect certain provisions of the 1937 Act. Following extensive hearings, the Secretary rendered his decision in favor of the proposed marketing agreement, based upon his findings: (1) that 80% to 90% of the Florida avocados are sold in markets outside the state, and that all handling of avocados grown in the designated production area is in the current of interstate and foreign commerce or directly affects such commerce; (2) that the growers and handlers of Florida avocados have been accustomed to sell the entire production in fresh channel markets, including fruit which is immature and otherwise of poor quality, and this has tended to reduce the demand and prices for Florida avocados; (3) that the situation can be remedied by imposition of official standards of quality and maturity, under a marketing agreement and order, as a condition precedent to the marketing of Florida avocados. (Paragraphs VI and VII of complaint, R. 6; 19 FR 2418 and 2784; Order No. 69 (abbreviated from 969), R. 19, published 19 FR 3439 and 7 CFR part 969, pp. 119-131 and Suppl. pp. 14-18.)

Beginning with the 1954-55 crop year (April of 1954 through March of 1955), the Secretary of Agriculture has issued numerous orders establishing standards of ma-

turity and quality for Florida avocados. (Paragraphs VIII, IX, X and XI of complaint, R. 6-8; exhibits "B" and "C" attached to complaint, R. 24-26.) Paragraph XII of the complaint alleges:

"'All avocados handled under said marketing order No. 69 are inspected by the joint inspection service of the state of Florida and the federal government and no load of avocados may lawfully depart from the state without presentation of a certificate of such inspection, showing requisite quality and maturity under said marketing order." (R. 8.)

Interest of appellants

Appellants are engaged in business as handlers of avocados and other agricultural products grown in the southern part of Florida, the appellant Florida Lime and Avocado Growers, Inc. at Princeton, Florida, and the appellant South Florida Growers Association, Inc. at Goulds, Florida, both in Dade County. They are themselves growers of avocados and operate groves for others. As handlers, they pick, pack, ship and sell avocados for numerous other growers. They have been duly registered as handlers of avocados under the federal marketing agreement ever since it was put into force. (Paragraph XIII of complaint, R. 8; also Pl. Ex. 1 and 2, R. 319 and 320.)*

Total shipments of Florida avocados in the 1954-55, 1955-56 and 1956-57 crop years, and in the 1957-58 crop

*In the hearing on defendants' motion to dismiss the complaint reference was made to the depositions of witnesses taken by stipulation at Miami, Florida, and to the exhibits identified by these witnesses, although not formally offered in evidence.

year to January 11, 1958, aggregated 1,687,017 bushels, and of these shipments appellants handled 870,580 bushels, over 50%. (Pl. Ex. 4, 5, 7, 8, 11, 19, 20, R. 322, 324, 327, 329, 330, 438.)

Manifestly, appellants have a large interest in the unfettered marketing of Florida avocados in all available markets. Only Florida and California produce avocados commercially. California is both the largest producer and the largest consumer of this fruit. Even though its own production of avocados substantially exceeds that of Florida, California is nevertheless a highly favorable market for the Florida fruit. It is a coincidence of crucial significance in this case that most Florida avocados are ready to be marketed, under the federal standards of maturity, at the nadir of California's supply of the fruit, in the advantageous fall months when other fresh fruits are no longer abundant. Note the comparative figures of shipments of California and Florida avocados in the 1955-56 and 1956-57 crop years:*

	Entire year (bushels)	Oct.-Dec. (bushels)
1955-56:		
California—	1,187,500	146,200
Florida —	516,103	298,140
1956-57:		
California—	575,500	91,500
Florida —	360,927	199,440

The increase in commercial production of Florida avocados during the past ten years from about 100,000 bushels

*Pl. Ex. 5 and 8, R. 324, 329.

a year to over 500,000 bushels, let alone the potential further increase to 800,000 to 1,000,000 bushels a year, has brought urgent need for enlarged markets, and the advent of transportation by refrigerated trucks has made it feasible to market this perishable fruit in California and other far western states. (R. 221-222.)

Time of marketing of Florida avocados

In each year since 1954, permissible dates for shipment of Florida avocados have been fixed by regulations issued by the Secretary of Agriculture. In 1954, 1955, 1956 and 1957, permissible shipping dates were established for 45 named varieties of Florida avocados. For each of these varieties, in each year, four permissible shipping dates were specified, in accordance with attainment by the fruit of a certain minimum size, measured either by weight or diameter: an "A" date, with highest size requirement; a "B" date, with slightly lower size requirement; a "C" date, with a further drop in size requirement; a final "D" date, when the remaining fruit of the designated variety could be shipped without size restriction. (Pl. Ex. 9, summary of 1957-58 shipping dates, R. 330.)

Oil content of the fruit does not enter into the determination of maturity; instead, correlation of picking dates for each variety, in each season, with attained weight or size. As appears from the complaint and exhibits, the several varieties are characterized by wide variance in oil content. (Pl. Ex. 10, R. 340-435, hereinafter summarized.)

Principal varieties of Florida avocados

Twelve varieties account for approximately 90% of Florida's avocado crop:*

	1955-56 and 1956-57	
	bushels	% of total
Lula	269,566	28.2
Booth 8	140,838	14.6
Booth 7	108,246	11.3
Waldin	88,407	9.2
Booth 1	47,219	5.0
Taylor	40,621	4.2
Pollock	39,018	4.0
Hickson	34,910	3.6
Collinson	29,967	3.1
Booth 3	28,907	3.0
Trapp	23,575	2.5
Fuchs	15,379	1.6

In the statement that follows regarding the oil content of Florida avocados, and the time of the year when these avocados are ready to be marketed, reference will be limited to the foregoing varieties.

Oil content of Florida avocados: deposition of Dr. Roy W. Harkness

The avocado trees of Florida trace back to cuttings brought from the tropical lowlands of the West Indies and Guatemala, while those of California are derivatives of trees grown in the higher, colder, less humid regions of Mexico and Guatemala. The Florida fruit is generally

*According to volume marketed in the 1955-56 and 1956-57 crop years. (Pl. Ex. 4 and 7, R. 322, 327.)

larger than that of California, with higher water content and much lower fat or oil content. Some of the highest grade Florida avocados, at full maturity, have as little as 2% oil content, in contrast with the 25% to 30% oil content of the dominant commercial varieties of California avocados, the Fuerte and Hass. (Paragraph XXII of complaint, R. 12; also R. 183.)

The deposition of Dr. Roy W. Harkness, chemist at the Sub-Tropical Experiment Station of the University of Florida, at Homestead, Florida, was taken primarily to establish that an 8% oil reqirement as a standard of maturity or quality of avocados, when applied to the varieties of avocados grown in Florida, is scientifically indefensible, arbitrary and discriminatory. The same testimony serves to show how drastically and inescapably the California 8% oil standard inhibits the marketing in that state of Florida avocados of unquestionable maturity and quality, to the great economic detriment of the growers and handlers of the Florida fruit.

Dr. Harkness received his Ph.D. degree in physical chemistry at the University of California in 1928; did research work for the Department of Agriculture in Washington until 1935, then for Houdry Products Corporation in Pennsylvania until 1946, and since 1946 has been engaged in various chemical research projects at the Sub-Tropical Experiment Station at Homestead. One of his research projects, carried on from the fall of 1951 to January 1955, called State Project 675, had for its objective ascertainment of some means indicating when avocados would mature. (R. 176.) Dr. Harkness gave parti-

cular consideration to measure of the oil content of the fruit as a possible standard of maturity; that was the principal part of the research at first. (R. 177.) Annual statements of the progress of the research project were published by Dr. Harkness in Florida Agricultural Experiment Station Reports in the years 1952, 1953, 1954 and 1955. (R. 182.)

In the course of State Project 675, Dr. Harkness made a great many oil tests of avocados picked by himself from groves of the experiment station and various commercial groves in and around Dade County, Florida. (R. 177-178.) These oil tests were made by the method used in California. (R. 178.) Identified collectively as plaintiffs' exhibit 16 are photostats of 82 pages of the books in which Dr. Harkness kept the record of his oil tests, also a typewritten analysis of some of the oil tests prepared by Dr. Harkness for use as part of his 1955 program report. (R. 178-181, 346-435.)

The significance of these oil tests, in relation to the marketing of the fruit in California, is that most Florida avocados reach maturity and are ready to be marketed before, if ever, they attain 8% oil content. Sheer volume precludes analysis at this time of the results of all the avocado oil tests made by Dr. Harkness in course of State Project 675. A short summary is submitted of the oil tests made in the 1953-54 and 1954-55 seasons of avocados of the 12 varieties above listed. For an indication of the stage of maturity of the avocados when Dr. Harkness

made his oil tests, the permissible shipping dates for each of the 12 varieties in the 1957-58 season are noted:*

Fuchs: [*Shipping dates:* "A" June 17; "B" July 1; "C" July 15; "D" August 5.]

1953—July 8 to 17—50 tests:**—2.5% to 4.9%.

1954—June 3 to July 12—6 tests:—1.6% to 3.2%.

Pollock: [*Shipping dates:* "A" July 1; "B" July 22; "C" August 5; "D" August 26.]

1953—July 6 to August 12—74 tests:—1.6% to 3.3%.

Trapp: [*Shipping dates:* "A" July 29; "B" August 12; "C" August 26; "D" September 16.]

1953—September 16—1 test:—3.2%.

Waldin: [*Shipping dates:* "A" August 5; "B" August 19; "C" September 2; "D" September 30.]

1953—July 27 to September 22—75 tests:—2.1% to 6.1%.

1954—July 20 to September 8—23 tests:—3.2% to 5.0%.

Booth 8: [*Shipping dates:* "A" September 16; "B" September 30; "C" October 14 and 28; "D" November 18.]

1953—August 12 to September 30—53 tests:—2.7% to 5.9%.

" —October 1 to 30— 24 tests:—4.4% to 6.8%.

" —November 7 to 25— 28 tests:—4.7% to 8.4% (26 under 8%)

" —December 3 and 16—3 tests:—8.3%, 9.3%, 8.8%.

1954—August 16 to September 30—31 tests:—3.2% to 6.2%.

" —October 5 to November 10—16 tests:—5.1% to 7.1%.

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*Although not contemporaneous with the oil tests made in State Project 675, the 1957-58 shipping dates (Pl. Ex. 9, R. 330), the latest available in the record on appeal, serve with substantial accuracy for illustrative purposes.

**These oil tests, in most instances, were of composite samples of 10 avocados, selected for uniformity of size. (R. 429)

Lula: [*Shipping dates:* "A" October 7; "B" October 21; "C" November 4 and 18; "D" December 9.]

1953—August 12 to September 30—127 tests:—2.3% to 7.9%.

" —October 1 to 30—91 tests:—4.9% to 11.0%.
(78 under 8%)

" —November 2 to 30—101 tests:—5.4% to 11.3%.
(58 under 8%)

—December 2 to January 13—88 tests:—4.5% to 13.1%.
(32 under 8%)

1954—August 24 to September 28—30 tests:—2.9% to 5.7%.

" —October 4 to 29— 85 tests:—4.7% to 9.2%.
(75 under 8%)

" —November 1 to 30— 44 tests:—5.7% to 9.6%.
(28 under 8%)

" —December 6 to January 11—21 tests:—7.1% to 12.9%
(4 under 8%)

Booth 7: [*Shipping dates:* "A" October 14; "B" October 28; "C" November 11; "D" December 2.]

1953—September 9 to October 14—27 tests:—3.2% to 6.9%.

" —October 16 to 30— 49 tests:—4.2% to 8.3%.
(46 under 8%)

" —November 2 to 23— 60 tests:—4.1% to 11.1%.
(45 under 8%)

" —December 1 to 16— 34 tests:—6.4% to 12.0%.
(10 under 8%)

1954—September 15 to October 12—10 tests:—3.8% to 6.5%.

" —November 2 to 30— 22 tests:—4.1% to 9.8%.
(12 under 8%)

" —December 6 to 14— 6 tests:—5.0% to 10.9%.
(2 under 8%)

Hickson: [*Shipping dates:* "A" October 21; "B" November 4; "C" November 18; "D" December 9.]

1953—September 29 to October 30—10 tests:—5.8% to 7.4%.

" —November 12 to December 4—6 tests:—6.9% to 10.0%.
(3 under 8%)

1954—September 22 to November 10—13 tests:—6.7% to 9.6%.
(9 under 8%)

Collinson: [*Shipping dates:* "A" October 21; "B" November 4; "C" November 18; "D" December 9.]

1954—October 13—1 test:—7.2%.

Booth 3: [*Shipping dates:* "A" November 11; "B" November 25; "C" December 9; "D" December 31.]

1953—October 6 to November 12— 10 tests:—4.0% to 8.3%. (9 under 8%)

" —November 16 to December 31—8 tests:—6.7% to 10.5%. (3 under 8%)

1954—November 10 to December 1—8 tests:—7.4% to 10.0%. (2 under 8%)

Booth 1: [*Shipping dates:* "A" November 18; "B" December 2; "C" December 16; "D" January 6.]

1953—October 22 to December 16—9 tests:—7.5% to 10.9%. (2 under 8%)

1954—November 1 to December 14—11 tests:—8.0% to 11.7%.

Taylor: [*Shipping dates:* "A" November 18; "B" December 2; "C" December 16; "D" January 6.]

1953—October 22 to November 18—21 tests:—6.1% to 9.9%. (12 under 8%)

" —November 24 to January 13—18 tests:—7.4% to 11.4%. (4 under 8%)

1954—November 1 to December 14—16 tests:—7.1% to 10.2%. (6 under 8%)

Oil tests made at Homestead Experiment Station upon request of growers and handlers of avocados.

In addition to the oil tests of avocados made by Dr Harkness as part of his research project, such oil tests continued to be made at the Homestead Experiment Station upon application by growers and handlers of avocados as a public service. (R. 185-186, 215.) In the fall months of 1954, 1955, 1956 and 1957, appellant Florida Lime and Avocado Growers, Inc. procured 150 such oil tests (Pl. Ex. 12, R. 337-340); appellant South Florida Growers Association, Inc., 135 oil tests (Pl. Ex. 13, R. 341-344).

The sole purpose of these oil tests was to ascertain whether the fruit could be shipped to California in face of the 8% oil requirement. (R. 224-225; 284-285.) These oil tests, in general, show the same results as the tests made by Dr. Harkness in course of his research project and in this respect furnish cumulative evidence of the restrictive effect of California's 8% oil standard upon the marketing of the Florida fruit. At the same time, these oil tests show the constant effort of appellants and other handlers of Florida avocados to avail themselves of the California market for their fruit even to the limited extent left open by the 8% oil barrier.

In the 1957-58 season, the latest season embraced in the deposition testimony, appellant Florida Lime and Avocado Growers, Inc. procured 24 oil tests, 20 of Lula avocados and 4 of Booth 8, the two principal commercial varieties of Florida avocados. (R. 340.) The "A" shipping date for Lula avocados in this season, under the regulation issued by the Secretary of Agriculture, was October 7, 1957. (R. 330.) Not until November 12 did any sample of the Lulas show 8% oil content, five weeks after the marketing of the Lulas began. The prior 8 tests of Lulas procured by appellant, from October 8 to November 6, showed oil content of 5.6% to 7.4%. Of the 12 samples tested November 12, 13 and 14, 10 showed oil content of 8.2% to 8.9% and 2 under 8%.* Encouraged by these oil tests, appellant ventured a shipment of a truckload of Lula avocados to California on November 15, 1957, consisting of 1874 quarter-bushel boxes, 900 consigned to Williams and Sons Produce Company, Los An-

*The oil tests made at Homestead were of composite samples of 6 avocados. The official tests made in California, under present regulations, are of individual avocados. (R. 75.)

gelés, and 974 to Felix & Son, Oakland. The [illegible] boxes unloaded at Los Angeles were tested for oil content in three lots, according to size of the fruit (number of avocados per box), and the 361 boxes of 16s and 18s were rejected for insufficient oil content, while the 539 boxes of 14s and 12s passed the oil test. (Pl. Ex. 22, R. 441.) The 974 boxes that went on to Oakland, and were there presumably tested for oil content, apparently passed the test. Fortunately, a buyer for the 361 boxes rejected at Los Angeles was found at Phoenix, Arizona, and the fruit was transshipped to that city, in this instance without loss. (Pl. Ex. 21, R. 440.)

Appellant South Florida Growers Association, Inc. had a similar experience in the 1957-58 season. After processing 22 oil tests of Lula avocados at the Homestead Experiment Station from November 1 to November 12, 1957, with 10 of the samples showing oil content of [illegible] to 7.8% and 12 samples showing 8.1% to 9.1%, appellant on November 14, 1957 sent 1,795 flats to Lucky Stores at San Leandro, California, on order of Calavo Growers of California, appellant's selling agent. At San Leandro, upon test of oil content, 492 flats were barred from sale in California. These 492 flats were transshipped to Salt Lake City, Utah, and sold at $1.00 per flat, as against the price of $1.89 per flat to be paid at San Leandro, and there were added transportation and handling costs of $202.02. (Pl. Ex. 17, 437.)

The report of the oil test made at Los Angeles on November 19, 1957, resulting in the rejection of 361 boxes of Lula avocados, graphically illustrates the practical difficulty and risk involved in appellants' efforts to sell their avocados in California, despite the 8% oil [illegible] (Pl. Ex. 22, R. 441.) As samples for testing, one [illegible]

was chosen from each of five boxes of the 16s and one from each of five boxes of the 18s. The oil percentage of the five 16s was 9.1, 7.8, 7.35, 9.6 and 9.1, and since two of the avocados had less than 8% oil content all of the 16s were tagged as non-conforming. The 18s tested 7.4, 9.95, 7.35, 7.75 and 9.0, three below the 8% oil, and this disposed of all the 18s. Even though picked, packed and shipped on the same day or days, from the same groves and even the same trees, there was inherent and inescapable risk that the individual avocados chosen for oil test would include some with less than 8% oil content.* Such risk is absent when the avocados tested are of varieties that attain 8% oil content at an early stage of growth, long before maturity, such as the dominant California varieties, but the avocados grown in Florida are not of these varieties. (Paragraph XII of complaint, R. 12.)

As appears from plaintiffs' exhibit 21 (R. 439), four entire truckloads of Lula avocados shipped to California by Florida Lime and Avocado Growers, Inc. on November 10, 12, 14 and December 8, 1955, failed to pass the 8% oil test. These shipments were made after the marketing of Lula avocados in the 1955-56 season had been under way since the first week of October 1955. (Pl. Ex. 4, R. 322.) The loss on these four shipments, net after salvage by sale in other far western states, was $7,490.01.

Portions of shipments of Lula avocados to California made by South Florida Growers Association, Inc. on November 10, 12 and 18, 1954, a shipment of Booth 7s on November 11, 1954, a shipment of Lulas on November 10, 1955, and a shipment of Lulas on November 29, 1956, were barred from sale in California upon oil test, then

*(Specimen of Dr. Harkness. (R. 183-185.)

reshipped mainly to Phoenix, Arizona, and there sold at somewhat lower prices, after added transportation and handling costs, as shown by plaintiffs' exhibit 17. (R. 436.) The shipment of November 29, 1956, out of which 721 flats were barred from sale in California, was made nearly two months after commencement of the marketing of Lula avocados in the 1956-57 season. (Pl. Ex. 6, R. 326; Pl. Ex. 7, R. 327.)

Reshipment of rejected avocados from California to cities in neighboring states entails not only loss on resale or reconsignment, it is also disruptive of appellants' direct marketing of the fruit in these cities. (Deposition of Kendall, R. 234.)

Appellants' shipments of avocados to California that were permitted to be sold in that state, listed in defendants' exhibits P, Q, R and S, were made preponderantly well along in November and in December, long after the beginning of the marketing season for the fruit.* As testified by Kendall, there is lively demand for the Florida fruit from representatives of California chain grocery stores as early as September, when the California supply is on the wane, and urgent inquiries for the fruit from California sources all through October, of which the Florida handlers are unable to avail themselves because of the 8% oil barrier. (R. 236-239.) This hurdle precludes arrangement for a fixed schedule of deliveries in California, to synchronize with retail sales promotional programs and

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*The fact that shipments made by Florida Lime and Avocado Growers, Inc. in the latter part of October and the first part of November 1954 apparently passed the California oil test, as indicated by defendants' exhibit S (R. 445), is accounted for by the testimony of Fred Piowaty, sales manager of said appellant, that the oil tests made of these shipments were of composite samples of several avocados, yielding an average result, instead of tests of single avocados as in 1955 and subsequent years. (R. 288.)

advertising, so that what is left to the Florida handlers is haphazard fill-ins, to the limited extent that shipment of the Florida fruit can be risked in face of the 8% oil embargo. (R. 232-233.)

Shipments of Florida avocados

Records of shipments of avocados from the Florida production area are compiled by the Avocado Administrative Committee from the weekly reports of handlers and, as appears from these records, the marketing of each of the varieties of the fruit begins promptly upon the advent of the permissible shipping dates specified in the applicable regulations issued by the Secretary of Agriculture and is completed within a few weeks thereafter. (Pl. Ex. 4 and 7, R. 322, 327.)

In the 1957-58 season, the Avocado Administrative Committee inaugurated issuance of weekly bulletins showing the volume of shipments per week, also whether for Florida or other destinations. These weekly bulletins issued July 1, 1957 to January 13, 1958 were produced by the witness David M. Biggar and in part marked for identification as plaintiffs' exhibit 10. (R. 331.) Total shipments in the 1957-58 season to January 11, 1958 aggregated 300,000 bushels, 8.5% for Florida destinations and 91.5% for other destinations. Of this total, 215,727 bushels were shipped by appellants—6,918 bushels to Florida destinations; 4,981 bushels to California, 203,828 bushels to other states. (Pl. Ex. 19 and 20, R. 438.)

The witness Biggar estimated that the total shipments for the 1957-58 season would be between 450,000 and 500,000 bushels. (R. 130-134.) By mid-November of 1957, 251,307 bushels had been shipped, only a negligible portion to California, and out of the remainder yet to be disposed of in this season only sporadic shipments to California could be hazarded.

Damage to appellants

Continued enforcement of California's 8% oil content requirement obstructs effective marketing of the avocados handled by appellants in two ways: (1) by maintaining an embargo against sale in California of all but a small portion of this fruit, and even as to this portion delaying sale until long after the fruit is ready for marketing; (2) by giving a competitive advantage to the growers and handlers of California avocados not alone in their home state but also throughout the country.

From the records of "unloads" of avocados at the three principal wholesale markets in California, Los Angeles, San Francisco and Oakland (R. 39-42), it is demonstrable that about 50% of all the avocados grown in the United States are consumed in California.* The same records show the extremely limited contribution of Florida avocados to these "unloads":

1954-55: California, 1,873 carlots; Florida, 45 carlots.
1955-56: California, 947 carlots; Florida, 48 carlots.
1956-57: California, 931 carlots; Florida, 64 carlots.

From the tabulations marked for identification as plaintiffs' exhibits 19 and 20, also defendants' exhibits P, Q, R and S (R. 438, 442-447), it is evident that these shipments of Florida avocados to California were preponderantly those of appellants, and from the allegations of paragraphs XIV and XXV of the complaint (R. 9) and reference to plaintiffs' exhibits 17 and 21, showing prices of the avocados barred from sale in California (R. 430,

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*The answer of Director Jacobsen to interrogatory No. 8 indicates that in the 10 crop years from 1944-45 through 1953-54 California produced 79% of the avocados grown in the United States, likewise 79% in the 1954-55 crop year, but 58% in the crop years 1955-56 and 1956-57. (R. 37.)

439), the indicated value of the avocados shipped by appellants to California in the 1954-57 period, net after deduction of estimated cost of transportation from Florida to California, was well over $200,000 in the case of South Florida Growers' Association, Inc. and over $170,000 in the case of Florida Lime and Avocado Growers, Inc. Probable multiplication of appellants' sales of avocados in California, with the arbitrary 8% oil requirement out of the way, is indicated by the fact that the 1954-57 sales were made despite impossibility of surmounting the 8% oil barrier until five to eight weeks or more after the major part of the Florida crop had attained maturity and had to be promptly marketed, also despite the inability of appellants to make commitments at the beginning of the fall season for scheduled deliveries to synchronize with promotional programs for retail sale of the fruit.

Practically all of the shipments of avocados made by appellants to California were of but a single one of the many varieties of the fruit grown in Florida, namely, the Lula variety. In the 1955-56 season an entire truckload of Lulas, shipped as late as December 8, 1955, more than two months after the marketing of this variety began, was barred from sale in California for failure to pass the 8% oil test. (Pl. Ex. 21, R. 440.) In the 1956-57 season, when the marketing of Lulas began October 8, 1956, 721 flats out of a shipment 1550 flats of Lulas made November 29, 1956 were likewise barred from sale in California. (Pl. Ex. 17, R. 439.)

During recent years, the several Booth varieties of Florida avocados, notably the Booth 8, 7, 1 and 3, have gained in favor and account for a large part of the new plantings. The Booth 8, rapidly gaining in volume of production, is an avocado more akin in size and general appearance to the California avocados than the generally

larger Florida varieties, yet because of the 8% oil requirement it has never been feasible to offer the Booth 8 for sale in California. (R. 223.)

Another factor assuring appellants of greatly increased sales of the Florida fruit in California, absent the artificial 8% oil restriction, is taste preference of residents of California who formerly lived in states where the Florida avocados predominate. (R. 237-238.) Also, the low fat content of the Florida avocados, branded as a vice by section 792 of the Agricultural Code of California, may well be regarded as a virtue by many consumers who have as yet had little opportunity to become familiar with the Florida fruit.

The persistent efforts of appellants to avail themselves of the California market for avocados, in face of the 8% oil handicap, is of itself the strongest evidence of the pressing need for free access to this market. Exclusion from the California market, except in small measure and at undue hazard, is but one facet of the economic detriment to appellants of continued enforcement of the challenged California statute. Equally hurtful, if not more hurtful, is the competitive advantage given to California growers in all markets by maintenance of a virtually closed home market. While the major part of the California crop is consumed within the state, the residue is sold in other states at obvious competitive advantage over the Florida growers, over 90% of whose avocados must be sold in these competitive markets. The California growers, with a protected home market for most of their crop, can offer price concessions in the markets where almost all of the Florida product must be sold, thus minimizing the profit potential of the entire Florida crop. The complaint is not of competition, but of artificial handicap against the growers of the Florida fruit.

Summary of Argument.

The Florida avocados handled by appellants enter into the stream of interstate commerce with the imprimatur of the federal government, granted under the commerce clause of the United States Constitution and an implemental Act of Congress. They are freely marketed in all states of the Union except California. By force of section 792 of the Agricultural Code of California, the avocados handled by appellants are permitted to be marketed in that state only if they have 8% or greater oil content. The result of enforcement of this state law is to bar sale in California of most Florida avocados, since they are preponderantly of varieties which because of their innate characteristics either never attain as much as 8% oil content or attain this measure of oil content long after they have come to maturity and are ready to be marketed.

Appellants invoke the commerce clause of the Constitution, the equal protection clause of the Fourteenth Amendment, and the marketing order No. 69 made by the Secretary of Agriculture pursuant to the Agricultural Marketing Agreement Act of 1937, against application of the California 8% oil requirement to their avocados. They urge that the 8% oil requirement, in application to their avocados, is arbitrary and discriminatory; that it does not serve to protect the people of California from purchasing and consuming immature, deleterious or unhealthful fruit, but only to exclude from that state mature and wholesome avocados grown in Florida, to the competitive advantage of the avocado industry of California; and further, that subjection of appellants' avocados to the California oil content standard, after these avocados have been certified for sale in interstate commerce under fed-

eral law, is an impermissible violation of the supremacy provision of the Constitution.

Further, appellants urge that there is an actual existing controversy between appellants and appellees regarding the constitutional validity of California's 8% oil content standard in application to the avocados of which appellants are handlers; that under Article III, Sec. 2, of the United States Constitution, and under sections 1331 and 1337 of the Judicial Code, the district court has jurisdiction to adjudicate the controversy on the merits, and that under section 1253 of the Judicial Code this court has jurisdiction of the appeal from the judgment of the three-judge district dismissing the action for want of jurisdiction; that appellants' assertion of rights under the Constitution of the United States, and the implemental Act of Congress, is substantial in nature and value; that there are no considerations of equity or public policy to justify non-exercise either by the district court or this court of the jurisdiction conferred by Congress.

ARGUMENT.

I.

Jurisdiction of the appeal.

Because of the nature of the relief sought by appellants, they prayed in their complaint for a hearing by a three-judge district court. (R. 16.) Upon consideration of the complaint, a three-judge court was duly convened and came into session on April 18, 1958 to hear the motions then pending, namely, the request filed by appellants February 24, 1958 that the action be set for trial at the early convenience of the court (R. 29) and the motions filed by appellees March 14, 1958 for dismissal or alternatively for stay of proceedings (R. 44, 78). Eight months after the hearing held April 18, 1958, the court filed its memorandum dismissing the action and stated: "This being an appropriate case, it has been heard by a three-judge district court pursuant to the provisions of Title 28 U. S. C. A. sections 2281 and 2284." (R. 90.) The court concluded, however, that it lacked jurisdiction to proceed with a determination of the merits of the action because it could not be categorized as a "case" or "controversy" within the scope of the judicial power of the federal courts, as specified in article III of the Constitution of the United States.

From the judgment of the district court, Congress has provided for direct appeal to this court. (28 U. S. C. 1253.) Although the appeal comes to this court as matter of right, pursuant to mandate of Congress, it is of course entirely within the discretion of the court to adjudicate the appeal in whatever manner it may deem appropriate. That the appeal merits plenary consideration, and that the judgment of the district court should be reversed, appellants submit: (1) that, contrary to the holding of the

district court, the complaint presents an existing controversy between the parties, with justiciable issues that can be effectively resolved by decree of the court; (2) that the constitutional rights asserted by appellants and sought to be protected by declaratory judgment and injunction are substantial, legally and factually; (3) that there are no considerations of equity or public policy warranting denial or deferment of a trial of the case on the merits, or refusal to grant the relief prayed if found to be justified by the evidence.

II.

There is an existing controversy between the parties, triable by the district court.

The gist of the district court's opinion is that there can be an existing justiciable controversy between the parties only with respect to the disposition of a particular shipment of appellants' avocados for sale in California, such controversy to be submitted to a state court of California in accordance with the procedure provided by section 385 of the Agricultural Code of California. By this pronouncement the door of the district court is forever closed to appellants, notwithstanding the duty imposed on the court by Congress to adjudicate a controversy of the kind embraced in sections 1331 and 1337 of the Judicial Code.

The district court has declared: "The past events on which this case is predicated are not of sufficient legal stature as to here and now create justiciable issues." (Ap. 4.) This enigmatic statement, it is submitted, ignores virtually all of the facts set forth in the foregoing statement of the case. The "past events" in this case include all that appears in the record on appeal as to the business of appellants: that they have been engaged for many years

in large-scale marketing in interstate commerce of avocados grown in Florida; that since June 11, 1954 their marketing of avocados has been conducted in conformity with a federal marketing plan put into force by the Secretary of Agriculture pursuant to authority vested in him by Congress; that all avocados handled by appellants meet the standards of maturity and quality established by the federal government; that for years appellants have made persistent efforts to market their avocados in California, as in all other states of the union, but that these efforts have been thwarted by enforcement against them of California's 8% oil content requirement, alleged to be arbitrary and scientifically indefensible in application to the Florida-grown avocados handled by appellants; that the officials of California have evidenced their consistent purpose to continue to enforce against appellants the 8% oil requirement, the effect of which is to exclude most Florida avocados from the principal market for this fruit in the United States; that continued enforcement of California's 8% oil content law against appellants entails danger of direct loss on attempted shipments of their avocados to that state, as shown by actual experience, also great and irreparable economic detriment by the walling off of the California market against most Florida avocados and the artificial competitive advantage thus given to the growers and handlers of the California-grown avocados.

The complaint in this case presents not an abstract question, but a real, immediate and sharply-defined controversy of substantial commercial importance not alone to appellants but to all growers and consumers of avocados and to the national economy. What is involved in this case is the right of appellants to market their avocados in California free from restriction by a state law alleged

to be unconstitutional, in the several respects set forth in the complaint, not the fate of another shipment of avocados that may be risked by one or other of the appellants in face of the challenged state law. Purposeless sacrifice of a load of Florida avocados of less than 8% oil content is not needed to evidence a real, immediate and substantial interest of appellants in the validity of the California law which restricts marketing of their avocados in that state, no more than it required submission to an arrest to evidence the interest of the appellant in *Ezzers v. Dwyer*, 358 U. S. 202, in the validity of the Tennessee statute which precluded him from riding in Memphis buses if he refused to seat himself in the rear space of such buses assigned to colored passengers.

In many analogous cases not involving any particular present transaction or incident, or present civil action or criminal prosecution by the enforcing state authorities, but based upon a state of facts evidencing the desire and need of the plaintiffs for judicial aid to remove barriers against future exercise of constitutional rights and the intent of state authorities to maintain such barriers, the courts of the United States have intervened to protect the asserted rights by declaratory judgment and injunction. Brief mention is made of a few illustrative cases.

Weaver v. Palmer Bros. Co., 270 U. S. 402, 46 S. Ct. 320: Injunction granted to restrain enforcement against appellee, a Connecticut manufacturer of comfortables made with sterilized shoddy, of a Pennsylvania statute prohibiting entirely use of shoddy in the manufacture of comfortables; no particular sale or attempted sale of appellee's merchandise involved, only its alleged right to make future sales in Pennsylvania free from prohibition of the challenged statute.

Baldwin v. G.A.F. Seelig, Inc., 294 U. S. 511, 55 S. Ct. 497:—Plaintiff, a milk dealer in New York, whose milk came from Vermont, was denied a license to continue to sell its milk in New York because it declined to sign an agreement to conform to the New York Milk Control Law, under which dealers were required to pay to producers specified minimum prices for their milk. Although public officials had announced a purpose to prosecute plaintiff for trading without a license, no actual prosecution had been instituted. Nor was there involved any particular sale or attempted sale of imported milk.

Dean Milk Co. v. City of Madison, Wis., 340 U. S. 349, 71 S. Ct. 295:—Pursuant to an ordinance of the city of Madison regulating the sale of milk, plaintiff was denied a license to sell its milk in that city because its pasteurization plants were located more than five miles from the central square of the city. Plaintiff's milk was purchased at many farms in Illinois and Wisconsin and pasteurized in plants located in Illinois towns 65 and 85 miles distant from Madison. In an action for declaratory judgment as to the validity of certain sections of the ordinance, brought in the state circuit court, the validity of the ordinance was upheld; judgment affirmed by the Supreme Court of Wisconsin; reversed by this court. The controversy was as to the right of appellant to deliver and sell its milk in Madison free from "an economic barrier protecting a major local industry against competition from without the state," not a controversy as to the disposition of a particular delivery of appellant's milk to Madison.

Foster-Fountain Packing Co. v. Haydel, 278 U. S. 1, 49 S. Ct. 1, and *Johnson v. Haydel*, 278 U. S. 16, 49 S. Ct. 6:—Louisiana Shrimp Act of 1926, also Oyster Act

passed at the same time, held unenforceable against plaintiffs, because by practical operation of the statutes the plaintiffs would be prevented from obtaining shrimp and oysters to be canned in their plants at Biloxi, Mississippi. The controversy was similar in *Toomer v. Witsell*, 334 U. S. 385, 66 S. Ct. 1156, wherein this court held that the five individual plaintiffs, fishermen who resided in Georgia, were entitled to injunctive relief against enforcement of certain provisions of a South Carolina statute the practical effect of which would be to debar them from fishing for shrimp in the three-mile maritime belt off the coast of that state.

H. P. Hood & Sons, Inc., v. Du Mond, 336 U. S. 525, 69 S. Ct. 657:—Plaintiff, engaged in the business of distributing milk and its products to inhabitants of Boston, procured milk from New York and had three receiving depots in that state. Plaintiff desired to establish a fourth receiving plant in New York, but a license to do so was denied by the Commissioner of Agriculture and Markets, acting pursuant to provisions of the Agriculture and Markets Law of New York. The determination made by the commissioner was upheld by the state courts; this court granted certiorari and reversed the judgment of the Court of Appeals of New York. Thus, the matter in controversy in this case was the desire and alleged right of a Massachusetts milk dealer to augment its business by procuring from another state an added supply of the product in which it dealt. Mr. Justice Jackson, delivering the opinion of the court, said:

"Baldwin v. G. A. F. Seelig, Inc., 294 U. S. 511, is an explicit, impressive, recent and unanimous condemnation by this court of economic restraints on interstate commerce for local economic advantage, but it does not stand

alone. This court consistently has rebuffed attempts of states to advance their own commercial interests by curtailing the movement of articles of commerce, either into or out of the state, while generally supporting their right to impose even burdensome regulations in the interest of local health and safety. * * * Our system, fostered by the commerce clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the nation, that no home embargoes will withhold his exports, and no state will by custom duties or regulations exclude them. Likewise, every consumer may look to the free competition from every producing area in the nation to protect him from exploitation by any. Such was the vision of the founders; such has been the doctrine of this court which has given it reality." (330 U. S. 525, 535, 539.)

Henderson v. United States, 339 U. S. 816, 70 S. Ct. 843:—A single "past event" accounted for this case, that on May 17, 1942 appellant was a passenger on the Southern Railway and made a futile attempt to be seated in the diner, because the two tables conditionally reserved for Negroes were partly occupied by white passengers. In October 1942 he filed a complaint with the Interstate Commerce Commission alleging that the foregoing conduct violated the Interstate Commerce Act by subjecting him to undue and unreasonable prejudice and disadvantage. The commission dismissed the occurrence as a casual incident and declined to enter an order as to future practices by the railroad company. A three-judge district court for the district of Maryland held that the railroad's general practice, as evidenced by its dining car regulations, was in violation of the Interstate Commerce Act and remanded the case to the commission for further proceedings. Thereafter the railroad company announced modified din-

ing car rules which the commission found not to be in violation of the Interstate Commerce Act. Appellant instituted another proceeding in the same district court to have the commission's order set aside, but the court sustained the modified rules. On appeal to this court, the judgment of the district court was reversed. With respect to jurisdiction, this court said:

"It is clear that appellant has standing to bring these proceedings. He is an aggrieved party, free to travel again on the Southern Railway. Having been subjected to practices of the railroad which the commission and the court below found to violate the Interstate Commerce Act, he may challenge the railroad's current regulations on the ground that they permit recurrence of comparable violations. *Mitchell v. United States*, 313 U. S. 80, 92-93." (339 U. S. at p. 823, 70 S. Ct. at p. 846.)

Browder v. Gayle, 352 U. S. 903, 77 S. Ct. 145:—In this action for declaratory judgment and injunction, the district court for Alabama held that the statutes of Alabama and ordinances of Montgomery requiring segregation of white and colored races on motor buses violated the due process and equal protection provisions of the Fourteenth Amendment, and on the appeal this court granted the motion of appellees to affirm the judgment. Each of the four plaintiffs had been required by a bus driver to comply with the segregation laws; two of them who had been arrested and fined for failure to comply had not pursued appeals. A declaration of rights was desired because plaintiffs intended to resume use of the buses if and when they could do so on a non-segregated basis without fear of arrest. (142 F. S. 707.)

Bryan v. Austin, 148 F. S. 563, and 354 U. S. 933, 77 S. Ct. 1396:—A South Carolina statute authorized the

the board of trustees of any school to demand a statement under oath from any teacher as to whether or not he or she was a member of the National Association for the Advancement of the Colored People. Refusal to submit the required statement entailed summary dismissal. An action for declaratory judgment and injunction against enforcement of the statute was brought in the district court for South Carolina by seventeen Negro school teachers who had refused to submit statements and had resigned. The three-judge district court held that it had jurisdiction, but by vote of two of the judges stayed the action to await construction of the statute by the state courts. District Judge Timmerman was of the opinion that the plaintiffs were not in a position to have the statute enforced against them because they were no longer employed as teachers and had no applications for employment pending which could be adversely affected by the statute. Chief Justice Parker, dissenting from the stay order,* urged that a declaration of rights was needed by plaintiffs to enable them to seek employment as teachers; that no administrative remedy could possibly cure the basic defect of unconstitutionality, and that judicial remedies in state courts need not be pursued before resorting to a federal court. By the time the appeal came before this court, the challenged South Carolina statute had been repealed and the cause had become moot, whereupon the judgment of the district court was vacated, "with leave to the appellants to amend their pleadings either to safeguard any rights that may have accrued to them by virtue of the operation of the repealed Act or to set forth a cause of action based on the operation of the new Act."

*148 F. S. at pp. 367-374.

The only "past events" giving rise to this action were the existence of the state law, the request of the school authorities for the prescribed statements and the failure of the teachers to submit statements. The "case" or "controversy" was as to the right of plaintiffs to seek future employment as teachers without compliance with the challenged statute.

Suggested procedure under section 385 of the Agricultural Code of California.

The district court opinion does not stop with the conclusion that appellants' complaint fails to present a justiciable controversy, but goes on to say that such a controversy could arise only if there were co-existence of four facts: (1) bringing of avocados to California by appellants; (2) failure of the avocados to meet the standards fixed by California law; (3) refusal of appellants to recondition or remove the avocados; (4) election by appellants to contest abatement of the avocados in the state courts as provided by section 385 of the Agricultural Code of California. (Ap. 3-4.)

Appellants (1) have brought avocados to California, to the limited extent such shipments could be ventured in face of the 8% oil content requirement; (2) some lots of these avocados have failed to meet the 8% oil test; (3) appellants have not "refused" to recondition the rejected avocados, but have availed themselves of the leave granted by the enforcing officers to remove the avocados from California. There remains to be considered the fourth ingredient of the court's formula, an election by appellants to contest abatement of a particular lot of avocados in the state courts as provided by section 385.

Turning now to section 385 (Ap. 6-9), it is to be noted first that the abatement procedure therein provided for applies to any fruits, nuts, vegetables or containers for which standards are prescribed in chapter 2 of division V of the Agricultural Code. Thus, for one thing, the allowance for "reconditioning" of products or containers found to be nonconforming could have myriad meanings or applications, depending on the fruits, nuts, vegetables or containers in question. The district court suggests that a lot of avocados found to be of less than 8% oil content could be "reconditioned by substitution," but that appellants chose instead to remove nonconforming avocados from the state. (Ap. 2.) It is respectfully submitted that this is an egregious fallacy. Assuming that somehow, after avocados are shipped from Florida to California and there found to contain less than 8% oil, other avocados could be substituted for the 2 to 10 samples tested (R. 75), it would require an oil test (and destruction) of the substituted avocados to make certain that they contain 8% oil. It is apparent that the "substitution" would have to be made by some other method of judging maturity and quality. The next step, presumably, would be a new oil test of the lot of avocados tagged as nonconforming, after substitution of other avocados for those previously tested. (R. 75.) There is no provision in the official regulations for successive oil tests of the same lot of avocados. (R. 74-75.) Were such successive tests permitted, it would reduce the whole process to an absurdity, the turning of a wheel of fortune in an attempt to find a set of sample avocados of 8% oil content and then to remove the tag of noncompliance from the residue of the lot.

Section 385, after stating how the nonconforming products shall be held and tagged, and that notice of such

action by the enforcing officers shall be given to the owner or agent, with opportunity to bring the lot into compliance, prescribes three different procedures for abatement of the nonconforming products. One is destruction of the products with written consent of the persons served with notice. The second is a court proceeding applicable to products that are perishable or subject to rapid deterioration; the third, a court proceeding of a different kind applicable to non-perishable products. Since avocados are highly perishable (R. 235), the second procedure for abatement is applicable, *viz.*:

"(*Petition for abatement.*) If the lot so held is perishable or subject to rapid deterioration, the enforcing officer may file a verified petition in any superior or inferior court of the state to destroy such lot or otherwise abate the nuisance. The petition shall show the condition of the lot, that the lot is situated within the county, that the lot is held, and that notice of noncompliance has been served as herein provided. The court may thereupon order that such lot be forthwith destroyed or the nuisance otherwise abated as set forth in said order." (Ap. 8.)

The manifest purpose and effect of this procedure is to formalize the abatement and protect the enforcing officer by making a court record of the officer's finding of noncompliance, the giving of the requisite notice of noncompliance and failure of the owner or agent to correct the deficieny. The discretion given to the court is to determine whether the nonconforming lot shall be forthwith destroyed or the nuisance otherwise abated. A lot of avocados of less than 8% oil content, if subjected to such abatement procedure, would necessarily be forthwith destroyed, or perhaps permitted to be removed from

the state as has been done by the enforcing officers without court sanction. This appears to be the alpha and omega of an abatement proceeding under section 385 relating to avocados.

Injunction, and even more declaratory judgment, are legal remedies fashioned to prevent risk or sufferance of loss, penalties, deprivation of anticipated trade and profits, or thwarting of personal or property rights, for which there is no adequate protection by suit for a money judgment. The sacrifice of a load of fruit suggested by the district court would be as purposeless as submission to an arrest by the appellant in *Ezers v. Dwyer*, *supra*, or submission to discharge in lieu of resignation by the teachers who sued for declaratory judgment in *Bryan v. Austin*, *supra*, and would not in the least help to define the issue in dispute between the parties to this action. The issue is not as to the correctness of the method used in California to make oil tests of avocados, or as to the correctness of such test in a particular instance. The issue is as to the propriety of subjecting any of appellants' avocados to the California oil test, just as the issue in *Public Utilities Commission of California v. United States*, 355 U. S. 534, 536-540, 78 S. Ct. 446, 449-451, was the propriety of subjecting the United States to the administrative procedure called for by section 530 of the Public Utilities Code of California, an issue decided in that case without requirement of any prior administrative proceeding of the kind called for by the state law.

Authorities cited by district court

The authorities cited by the district court do not gainsay jurisdiction in the present case. The unique proceeding in *Muskrat v. United States*, 219 U. S. 346, 31 S. Ct. 250, had its genesis in an act of Congress passed March

1, 1907, attempting to confer jurisdiction upon the Court of Claims, with right of appeal to the Supreme Court, in a proceeding to be instituted for the purpose of obtaining an adjudication as to the constitutionality of certain acts of Congress relating to allotments of the lands and funds of the Cherokee tribe and to the restrictions upon alienation, encumbrance or right to lease the allotted lands. The proceeding was not a form of action that could result in a judgment enforceable against the litigants, but was intended merely to obtain an advisory opinion of the court regarding the validity of the acts of Congress in question, an indirect method of obtaining an advisory opinion which this court would decline to give at the direct request of Congress. By contrast, the present proceeding is a conventional action for injunctive relief, combined with an action for declaratory judgment pursuant to section 2201 of the Judicial Code, with adversary parties against whom the judgment of the court will be enforceable and effective.

Ramspeck v. Federal Trial Examiners Conference, 345 U. S. 128, 73 S. Ct. 570, cited by the district court, was decided on the merits and involved no question of the jurisdiction of the federal courts.

In *United Public Workers, et al., v. Mitchell*, 330 U. S. 75, 67 S. Ct. 556, twelve federal civil service employees, also United Public Workers of America, sought to enjoin enforcement of the Hatch Political Activity Act and this court held that there was a justiciable controversy only upon the complaint of the appellant Poole; that as to the other appellants there was no sufficiently precise showing of the political activity in which they desired to engage, so that it could not be determined whether or not the proposed political activity was prohibited by the Act

and might subject them to its penalties. "We can only speculate as to the kinds of political activity the appellants desire to engage in or as to the contents of their proposed public statements or the circumstances of their publication." (67 S. Ct. at p. 564.) As to the appellant Poole, however, he was under charge by the Civil Service Commission with political activity forbidden by the Act, and a proposed order for dismissal from his position specified the place and exact nature of such activity (67 S. Ct. at p. 565, footnote 24). Certainly the holding in the cited case is not authority for non-exercise of jurisdiction in the present case, since the record on this appeal shows abundantly what the appellants desire to do, that is, to market in California, as in all other states, avocados grown in Florida of less than 8% oil content, but nevertheless mature and of good quality, inspected and certified as in conformity with the standards established under federal law.

The decision of this court in *Public Service Commission of Utah v. Wycoff Co.*, 344 U. S. 237, 73 S. Ct. 236, does not militate against exercise of federal jurisdiction in the present case. Although the complaint prayed for declaratory relief and injunction to prevent the Public Service Commission from attempting to stop plaintiff from transporting motion picture film and newsreel between points within the state of Utah, on the ground that this would interfere with interstate commerce, plaintiff "offered no evidence whatever of any past, pending or threatened action by the Utah Commission touching its business in any respect." Notwithstanding the prayer for injunction, no request was made for hearing by a three-judge district court. The district court, after trial, found that plaintiff's transportation between points in Utah was nothing more than intrastate commerce and

upon that ground dismissed the complaint; the Court of Appeals found the contrary, reversed the judgment and remanded the case for further proceedings; this court granted certiorari and held that the suit could not be entertained as one for injunction and should not be continued as one for declaratory relief. Mr. Justice Jackson, speaking for the majority of the court, said:

"The complainant in this case does not request an adjudication that it has a right to do, or to have, anything in particular. It does not ask a judgment that the commission is without power to enter any specific order or to take any concrete regulatory step. It seeks simply to establish that, as presently conducted, respondent's carriage of goods between points within as well as without Utah is all interstate commerce. One naturally asks, so what? To that ultimate question no answer is sought. A multitude of rights and immunities may be predicated upon the premise that a business consists of interstate commerce. What are the specific ones in controversy? The record is silent and counsel little more articulate." An anticipatory declaration as to the validity of possible action to be taken by the commission, of a kind left to conjecture, was said to be "much like asking a declaration that the state has no power to enact legislation that may be under consideration but has not yet shaped up into an enactment." (344 U. S. at pp. 244 and 245.)

California maintains in force the provision of its Agricultural Code barring sale in that state of avocados of less than 8% oil content. Florida avocados of less than 8% oil content, shipped to California in interstate commerce, have in the past been barred from sale in that state and there is no vestige of doubt will continue to be barred by the enforcing officers of the state unless

and until the 8% oil law is declared invalid by a court of competent jurisdiction. In contrast with the *Wycoff* case, there is certainty and not conjecture regarding the course of state action alleged unjustifiedly to interfere with interstate commerce, certainty of the adjudication sought by appellants, and certainty that the proposed decree will end the controversy.

In *Aetna Life Insurance Co. v. Haworth*, 300 U. S. 227, 57 S. Ct. 461, an action for declaratory judgment wherein the district court dismissed the complaint upon the ground that it did not set forth a "controversy," and the judgment was affirmed by the Court of Appeals, this court reversed the judgment and declared that a justiciable dispute existed between the insurer and the insured with respect to legal rights and obligations arising from the contracts of insurance issued to the insured. The insured claimed the benefits provided by the policies for total and permanent disability, without obligation to pay further premiums, while the insurer claimed that the alleged disability did not exist and that the policies had lapsed for nonpayment of premiums. Determination of the disputed question of fact, whether the insured was totally and permanently disabled when he ceased to pay premiums, would settle the dispute as to the rights of the parties under the policies, and this question of fact could be litigated in the insurer's action for declaratory judgment as well as in an action by the insured for unpaid benefits.

The decision in *Aetna Life Insurance Co. v. Haworth*, it is submitted, is authority for the exercise of jurisdiction in the present case. Appellants, licensed under federal law as dealers in avocados grown in Florida, are engaged in marketing such avocados throughout the United

States. The avocados indigenous to Florida are of low oil content; most of them never attain as much as 8% oil content; those that ultimately attain 8% oil content do so only late in the marketing season. A California law bars sale in that state of all avocados of less than 8% oil content, so that its practical effect is to preclude the marketing of most Florida avocados in that state, although these avocados attain maturity and are of good quality even though of less than 8% oil content. California's 8% oil requirement has been enforced against appellants at all times that they have ventured to make shipment of their avocados to that state and avowedly will continue to be enforced while the law remains in force. The question whether the 8% oil barrier can justifiably continue to be maintained against importation and sale in California of appellants' avocados, in face of the commerce clause of the United States Constitution, the equal protection clause of the Fourteenth Amendment, and the express permission given under an act of Congress to market these avocados in interstate commerce, is as clearly a "case" or "controversy" as the dispute held to be justiciable in the *Aetna* case.

III.

Appellants' assertion of constitutional rights is substantial in nature and value.

A.

The commerce clause of the United States Constitution, article I, section 8, clause 3, of its own force and without aid of legislation by Congress regulating interstate commerce, renders void a state law that in its practical operation obstructs and burdens interstate commerce by imposing unreasonable and arbitrary conditions affect-

ing importation and sale of the wholesome and legitimate products of another state.

Minnesota v. Barber, 136 U. S. 313, 10 S. Ct. 862.

Brimmer v. Rebman, 138 U. S. 78, 11 S. Ct. 213.

Shollenberger v. Pennsylvania, 171 U. S. 1, 18 S. Ct. 757.

Collins v. New Hampshire, 171 U. S. 30, 18 S. Ct. 768.

West v. Kansas Natural Gas Co., 221 U. S. 229, 31 S. Ct. 565.

Best & Co. v. Maxwell, 311 U. S. 454, 61 S. Ct. 334.

Southern Pacific Co. v. State of Arizona, 325 U. S. 761, 767-768, 779-781, 65 S. Ct. 1515, 1519-1520, 1525-1526.

Freeman v. Hewit, 329 U. S. 249, 252, 67 S. Ct. 274, 276.

In the case last cited, dealing with the Indiana Gross Income Tax Act of 1933, the court stated (by Mr. Justice Frankfurter):

"In two recent cases we applied the principle that the commerce clause was not merely an authorization to Congress to enact laws for the protection and encouragement of commerce among the states, but by its own force created an area of trade free from interference by the states. In short, the commerce clause even without implementing legislation by Congress is a limitation upon the power of the states. *Southern Pacific Co. v. Arizona*, 325 U. S. 761; *Morgan v. Virginia*, 328 U. S. 373. In so deciding we reaffirmed, upon fullest consideration, the course of adjudication unbroken through the nation's history. This limitation of state power, as the *Morgan* case

so well illustrates, does not merely forbid a state to single out interstate commerce for hostile action. A state is also precluded from taking any action which may fairly be deemed to have the effect of impeding the free flow of trade between states. It is immaterial that local commerce is subjected to similar encumbrance. * * * These principles of limitation on state power apply to all state policy no matter what interest gives rise to its legislation."

Reference is also made under this division of the argument to *Baldwin v. G. A. F. Seelig, Inc., H. P. Hood & Sons, Inc., v. Du Mond, Dean Milk Co. v. City of Madison, Wis., Foster-Fountain Packing Co. v. Haydel, Johnson v. Haydel,* and *Toomer v. Witsell,* cited *supra,* at pp. 29-31.

That the rights asserted by appellants under the commerce clause of the United States Constitution are akin to those asserted and protected in the foregoing decisions of this court appears clearly from the averments of the complaint.

Since California's 8% oil content law, in practical effect, results in discriminatory advantage to the growers and handlers of the avocados of high oil content indigenous to California, against those who bring into the state the avocados of low oil content indigenous to Florida, enforcement of the 8% oil requirement against appellants also denies to them the equal protection of the laws guaranteed by the Fourteenth Amendment. Assuming that the purpose prompting enactment of the 8% oil law was to protect the people of California from purchase and consumption of unhealthful or immature fruit, appellants submit that application of the 8% oil requirement to the Florida avocados of which they are handlers does not at all serve such purpose, but serves instead merely to give

their California competitors an artificial competitive advantage. (*Morey v. Doud*, 354 U. S. 467, 463-468, 77 S. Ct. 1344, 1349-1351, and the cases therein discussed.) There is "invidious discrimination" in a classification of avocados favoring all those with 8% oil content against all with less than 8% oil, in disregard of the inherent differences between the numerous varieties of the fruit arising from the climatic conditions under which they are grown and the arbitrariness of oil content as a criterion of quality and maturity of the varieties grown in Florida.*

B.

Enforcement of California's 8% oil content law to bar sale in that state of Florida avocados of less than 8% oil content, but certified as mature and of requisite grade under standards established pursuant to an act of Congress regulating interstate commerce, defeats the effectiveness of the federal regulation and is impermissible.

Currin v. Wallace, 306 U. S. 1, 11, 59 S. Ct. 379, 385:- Action by tobacco warehousemen and auctioneers in Oxford, North Carolina, for declaratory judgment as to constitutionality of Tobacco Inspection Act passed by Congress in 1935 and for injunction against its enforcement; held that the plaintiffs were entitled to invoke the Declaratory Judgment Act, that Congress had authority to enact the challenged statute and to delegate to the Secretary of Agriculture authority to establish standards for the tobacco to be sold at designated auction markets. What is said in the opinion of the court (by Mr. Justice Hughes)

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*In numerous other standardization provisions in the California Code, inherent differences in the several varieties of the fruits and differences in growing conditions in different parts of the state, are given recognition.

in the cited case is directly applicable to the contention of appellants in the present case, *viz.*;

"Having this authority to regulate the sales on the tobacco market, Congress could prescribe the conditions under which the sales should be made in order to give protection to sellers or purchasers or both. Congress is not to be denied the exercise of its constitutional authority in prescribing regulations merely because these may have the quality of police regulations. * * * Inspection and the establishment of standards for commodities has been regarded from colonial days as appropriate to the regulation of trade, and the authority of the states to enact inspection laws is recognized by the Constitution. * * * But the inspection laws of a state relating to exports or to articles purchased for shipment to other states are subject to the paramount regulatory power of Congress. *Turner v. Maryland*, 107 U. S. 38, at pp. 57, 58, 2 S. Ct. 44, at p. 60. And Congress has long exercised this authority in enacting laws for inspection and the establishment of standards in relation to various commodities involved in transactions in interstate or foreign commerce. (Statutes cited in footnote 10.)" (307 U. S. at pp. 11-12, 59 S. Ct. at p. 385.)

Instances of application of the principles enunciated in *Currin v. Wallace* include the following:

McDermott v. Wisconsin, 228 U. S. 115, 133, 33 S. Ct. 431, 435:- Wisconsin law relating to the labeling of glucose mixtures offered for retail sale held inapplicable to such product when labeled in conformity with the requirement of the federal Pure Food and Drug Act.

Cloverleaf Butter Co. v. Patterson, 315 U. S. 148, 167-168, 62 S. Ct. 491, 502-503:- Condemnation of renovated butter under the laws of Alabama held to conflict with the

provisions of the federal Internal Revenue Code regulating the inspection, manufacture, storage and marking of renovated butter, therefore the judgment below denying injunctive relief was reversed.

Rice v. Santa Fe Elevator Corporation, 331 U. S. 218, 67 S. Ct. 1146:- Plaintiffs were engaged in the business of operating public warehouses for the storage of grain in Illinois, under licenses issued by the Secretary of Agriculture pursuant to the United States Warehouse Act, and it was held by this court that the plaintiffs were not subject to regulation under the Illinois Public Utilities Act and the Illinois Grain Warehouse Act with respect to matters under federal regulation. "The test, therefore, is whether the matter on which the state asserts the right to act is in any way regulated by the federal act. If it is, the federal scheme prevails though it is a more modest, less pervasive regulatory plan than that of the state. By that test each of the nine matters we have listed is beyond the reach of the Illinois Commission since on each one Congress has declared its policy in the Warehouse Act. The provisions of Illinois law on those subjects must therefore give way by virtue of the supremacy clause. U. S. Const., Art. VI, Cl. 2." (331 U. S. at p. 230, 67 S. Ct. at p. 1155.)

Franklin National Bank of Franklin Square v. New York, 347 U. S. 373, 375-379, 74 S. Ct. 550, 552-554:- The New York Banking Law prohibited use of the word "savings" in the name of any bank other than its own chartered banks and savings and loan associations, and this state law was held to be invalid in application to national banks regulated under the Federal Reserve Act. "There appears to be a clear conflict between the law of New York and the law of the federal government. We

cannot resolve conflicts of authority by our judgment as to the wisdom or need of either conflicting policy. The compact between the states creating the federal government resolves them as a matter of supremacy. However wise or needful New York's policy, a matter as to which we express no judgment, it must give way to the contrary federal policy." (347 U. S. at pp. 378-379, 74 S. Ct. at p. 554.)

State laws and proceedings dealing with labor-management relations have been held invalid by this court, in an array of cases, because of conflict with national legislation regulating such relations. A summary of earlier cases appears in the opinion of the court (by Mr. Justice Frankfurter) in *San Diego Building Trades Council, etc. v. Garmon*, 79 S. Ct. 773.

The federal marketing agreement under which appellants market their avocados has as its main feature the establishment by the Secretary of Agriculture of maturity and quality standards for the avocados coming from the production area to which the agreement applies. When shipped for sale in California, compliance of these avocados with the standards of maturity and quality established under federal law is ignored and compliance with a basically different standard is demanded. Appellants submit that their assertion of rights under the Constitution of the United States and under the Agricultural Marketing Agreement Act of 1937, is indeed substantial.

C.

As to the substantiality of appellants' assertion of rights in monetary value, little need be added to the statement of the facts at pp. 6-8 and 20-22, *supra*. Despite the 8% oil barrier, limiting appellants' sales of avocados in California virtually to a single variety, and to sales

even of this variety late in the marketing season, each of the appellants has sold a substantial volume of avocados in California since 1954. There could be no stronger evidence of the demand for Florida avocados in California. Stated in dollars, the gross receipts of appellant South Florida Growers Association, Inc. from sale of avocados in the three fiscal years from April 1, 1954 to March 31, 1957 aggregated $2,819,718, of which $223,514 was derived from sales in California. (R. 85-86.) The gross receipts of appellant Florida Lime and Avocado Growers, Inc. from sale of avocados during the same three-year period aggregated $761,934, of which $177,502 was derived from sales in California. (R. 87-88.)* It is apparent that even a modest increase of sales, in an unrestricted California market, would soon mount up to a large figure. Growth of the avocado industry in Florida indicates ability to meet increased demand for the fruit in all markets.

In the California market particularly, the Booth 8 variety of Florida avocados—akin in size and general appearance to the leading California varieties—would be especially competitive, but the 8% oil barrier has kept the Booth 8 completely out of the California market. (R. 217, 224.) The Booth 8 is rapidly increasing in volume because the newer groves have been planted heavily with this variety. (R. 224.)

In many cases in the federal courts in which the object of the suit was to remove an obstruction to the carrying on or expansion of business, and in which both jurisdiction and the right to injunctive relief depended upon proof of the value involved, such proof was made by show-

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*More than half of the California sales of Florida Lime and Avocado Growers, Inc., in the three-year period were made in 1954. (See footnote on p. 18, *supra*.)

ing reasonable anticipation of increased sales and profits upon removal of the obstruction. (*Gibbs v. Buck*, 307 U. S. 66, 76, 59 S. Ct. 725, 730, footnote 10; *Nord v. Griffin*, 7 C. A., 86 F. 2d 481, 483, c.d. 300 U. S. 673; also cases cited in the annotation "Jurisdictional amount in injunction suits," 30 A. L. R. 2d, Secs. 27, 28 and 29.) In the unfair competition case of *Food Fair Stores v. Food Fair*, 1 C. A., 177 F. 2d 177, 183, the plaintiff was a Pennsylvania corporation then operating 103 stores in 7 states, but none in Massachusetts. It brought suit in the federal court to enjoin operation of stores by defendant in Massachusetts under the name "Food Fair" and, as proof both of the requisite jurisdictional amount and the right to injunctive relief, showed past negotiations for acquisition of stores in Massachusetts without result, and "active contemplation" of future acquisition of stores in that state. The value involved was said to be the custom to be derived from such contemplated stores, if opened free of competition with other local stores by the same name.

In *Morey v. Doud*, 146 F. S. 887, affd. 354 U. S. 457, 77 S. Ct. 1344, this court accepted as sufficient showing of imminence of irreparable injury the representation of plaintiffs that they were deterred from establishing additional currency exchanges and thus expanding their business by fear of incurring the penalties of the challenged Illinois statute, also their contention that the statute gave a competitve advantage to American Express Company.

In the present case, appellants claim that expansion of their sales in California is checked by the challenged California statute and that their profits are curtailed by the competitive advantage thus given to the producers of Cali-

fornia avocados not alone in their own state but throughout the country. There is no possible recovery of damages for the economic detriment of which appellants complain, the hazard of further loss on shipments of their avocados to California in face of the 8% oil content requirement, the loss of opportunity to expand their sales in the principal market for avocados in the United States, and the discriminatory competitive advantage to the California avocado industry resulting from continued enforcement of the 8% oil law. As stated in the answer to appellees' motion to dismiss the appeal, the detriment to appellants of enforcement of the challenged California law is real, substantial, immediate and continuous, and increases in extent as the avocado trees planted in Florida in recent years come into fruition.

IV.

There are no considerations of equity or public policy to warrant non-exercise of federal jurisdiction in this case.

The disposition of this case made by the district court invites repetition of the oft-quoted admonition of Mr. Chief Justice Marshall in *Cohens v. Virginia*, 6 Wheat. 264, 404, 5 L. Ed. 257, 290: "It is most true that this court will not take jurisdiction if it should not; but it is equally true that it must take jurisdiction if it should. We have no more right to decline the exercise of jurisdiction which is given than to usurp that which is not given. The one or the other would be treason to the Constitution."

Certainly the duty of the federal courts to exercise jurisdiction of controversies arising under the Constitution and laws of the United States, even more emphati-

cally a controversy arising under an Act of Congress regulating interstate commerce, is no less mandatory than the duty to exercise jurisdiction in diversity cases. (*Meredith v. City of Winter Haven*, 320 U. S. 228, 234-238, 64 S. Ct. 7, 11-13.) Granted that there is here a "controversy" within the judicial power of the United States, there are present no extraordinary circumstances to excuse refusal or deferment of exercise of federal jurisdiction in this case.

The state law in question calls for no construction. Its meaning is entirely clear. Even if there were leeway for construction of the statute, affecting the issue here to be determined, that would not be a valid reason for non-exercise of federal jurisdiction in this case. (*Meredith v. City of Winter Haven, supra; Doud v. Hodge*, 350 U. S. 485, 76 S. Ct. 491.)

The only state court proceeding suggested by the district court for assertion of the rights claimed by appellants, interposition of a defense by appellants to a petition by an enforcing officer under section 385 of the Agricultural Code for abatement of a lot of avocados found to be of less than 8% oil content, would be bootless and would not reach the issue of the constitutionality of the statute pursuant to which the oil test is made (*supra*, pp. 34-37). Even if there were possibility that the issue of constitutionality could be litigated in such abatement proceeding, such issue is *judicial* in nature and appellants would still have the right to choose the federal court as the forum in which to litigate the issue. (*Lane v. Wilson*, 307 U. S. 268, 274, 59 S. Ct. 872, 875; *Railroad & Warehouse Commission of Minnesota v. Duluth Street Ry. Co.*, 273 U. S. 625, 628, 47 S. Ct. 489; *Bacon v. Rutland R. Co.*, 232 U. S. 134, 34 S. Ct. 283.)

Conclusion.

This court has made immeasurable contribution to fulfillment of the purpose of the federal constitution to provide freedom of commerce among the states. This case, it is submitted, presents another occasion for such service to the nation. No matter what motives inspired the original enactment of the California law in question, it is now established by horticultural research and experimentation that percentage of oil content is not a scientifically defensible determinant of maturity of avocados, and that the vice of the attempt to judge maturity by oil content is greatly aggravated when the same percentage of oil content is required of all the numerous varieties of the fruit in disregard of innate differences in characteristics.

Since June 11, 1954 appellants have been permitted to market the Florida-grown avocados only when certified as in compliance with the maturity and quality standards imposed by federal law, yet such certification of appellants' avocados has been held for naught by the state officers of California. Only by intervention of this court can this flagrant flaunting of federal law be stayed. The judgment of the district court, denying hearing of appellants' complaint, appellants urge, should be reversed.

Respectfully submitted,

ISAAC E. FERGUSON,

Attorney for Appellants.

APPENDIX I

Opinion of District Court

In the United States District Court for the Northern District of California, Northern Division.

Florida Lime and Avocado Growers, Inc., a Florida corporation, and South Florida Growers Association, Inc., a Florida corporation, Plaintiffs, vs. W. C. Jacobsen, Director of the Department of Agriculture of the State of California, Goodwin J. Knight, Governor of the State of California, and Edmund G. Brown, Attorney General of the State of California, Defendants. Civil No. 7648.

MEMORANDUM AND ORDER

This being an appropriate case, it has been heard by a three-judge district court pursuant to the provisions of Title 28 U. S. C. A. §§2281 and 2284.

Plaintiffs are Florida growers and packers of avocados and, concededly, are engaged in the interstate marketing of their product. They complain of the barrier which certain portions of the California Agricultural Code assertedly presents to the importation of their product into the State of California.

Division 5 ("Standardization"), Chapter 2 ("Fruit, Nut and Vegetable Standards"), of the California Agricultural Code, sets out a comprehensive system of packing, marketing and quality control of agricultural products including, *inter alia*, avocados. Plaintiffs first encounter this control as their fruit enters California, inspection being had at the familiar agricultural inspection stations located at the border wherever a highway enters the State (§782.6).[1] There the load is sampled (§782), and if

[1]All references in this opinion to sections are to sections of the Agricultural Code of the State of California unless otherwise specifically noted.

the fruit fails to meet the standards imposed by any pertinent section of the Agricultural Code (§785), the load is tagged as nonconforming fruit. Such noncomplying fruit is declared a nuisance and, if not reconditioned, is subject to seizure and eventual abatement as a nuisance (§78

Reconditioning would involve, here, the substitution of qualified fruit for that found lacking, when weighed against the standards fixed by Chapter 2. The specific standard of which plaintiffs complain is that found in §792, which requires that all avocados contain not less than 8% oil by weight, excluding the skin and seed.

Plaintiffs allege that the variety of avocado grown by them in Florida differs from those grown in California in that they inherently possess a lesser percentage of oil by weight than those cultivated in California; that the varieties which they would introduce into California seldom meet the oil test of §792 at the time when they are in prime marketing condition.

It is further alleged that plaintiffs have shipped loads of avocados into California, several of which were found not to conform to the standard imposed by §792, and that those nonconforming loads were not reconditioned by substitution, but were removed from the state and marketed elsewhere (§785).

On the above stated facts, plaintiffs ask this court for certain declaratory and injunctive relief. Such relief cannot be granted as this court lacks jurisdiction of the cause.

The basic rule is that this court is a court of limited jurisdiction, and has no authority beyond that specifically granted it by law. The jurisdiction of this court is never presumed. The presumption is to the contrary (Lehigh Mining & Manufacturing Co. v. Kelly, 160 U. S. 327; United States v. Green, 107 F. 2d 19; and Durkey v.

Arndt, 46 F. Supp. 256). The first principle of federal jurisdiction is that it is the duty of litigants to make clear to the court the basis of its jurisdiction over the proceeding. Likewise, it is the duty of the court to make sure that jurisdiction exists. If federal jurisdiction is not apparent, the court not only will, but must, refuse to proceed with the determination of the merits of the controversy, unless this failure can be cured. This is true regardless of what stage the case may be in, and whether the defect is called to the court's attention by suggestion of the parties, or otherwise (Mansfield, C. & L. M. Railway Co. v. Swan, 111 U. S. 379; Warner v. Territory of Hawaii, 206 F. 2d 851; Koike v. Atchison, T. & S. F. Ry. Co., 157 Fed. 623; Skelly v. Dockweiler, 75 F. Supp. 11; and American Distilling Co. v. City of Sausalito, 73 F. Supp. 520).

The jurisdiction of a federal district court finds its initial limitation in the ultimate source of the court's authority, namely, the Constitution of the United States. A matter, to be justiciable, must be capable of categorization as either a "case" or a "controversy" (United States Constitution, Art. 3). While a wide variety of forms of action and remedies are permissible, the complaint—as a constitutional prerequisite to the assumption of jurisdiction by a federal court—must show that the case presents for determination *an existing dispute as to present legal rights.* When this is not affirmatively shown, the case must be disposed of as provided by the Federal Rules of Civil Procedure, §12(h)(2), where it is decreed that, ". . . Whenever it appears . . . that the court lacks jurisdiction of the subject matter, the court shall dismiss the action."

There is no claim here of any present existing controversy between the parties. The claim at best suggests no more than a threatened controversy. An actual con-

troversy could arise only if there were a co-existence of four facts, namely:

1. The bringing of avocados to California by plaintiffs;

2. The failure of avocados to meet the standards fixed by law;

3. The refusal of the plaintiffs to recondition or remove the avocados; and

4. An election by plaintiffs to contest the abatement in the State courts as provided by §785.

This lack of a present, actual, existing controversy concludes the jurisdiction of this court (Muskrat v. United States, 219 U. S. 346). The past events on which this case is predicated are not of sufficient legal stature as to here and now create justiciable issues (Aetna Life Insurance Co. v. Haworth, 300 U. S. 227). The record now before this court shows no more than a mere prospect of interference posed by the bare existence of the law in question (United Public Workers v. Mitchell, 330 U. S. 75; and Wycoff Co., Inc. v. Public Service Comm'n. of Utah, 344 U. S. 237; c.f.: Ramspeck v. Federal Trial Examiners, 345 U. S. 128). On the record now before it this court has no authority to take jurisdiction in this case, and is left with no course other than to dismiss the action at this time.

Defendants have filed motions to dismiss this action on a variety of grounds, all of them being premised on various subsections of Federal Rules of Civil Procedure §12. Since this case must be dismissed because of a lack

of jurisdiction, it is unnecessary to consider defendants' motions to dismiss.

IT IS, THEREFORE, ORDERED that plaintiffs' complaint and the cause of action sought to be set forth in said complaint be, and the same is, hereby dismissed.

Dated: December 17th, 1958.

ALBERT LEE STEPHENS
Chief Judge, United States Court of Appeals for the Ninth Circuit.

LOUIS E. GOODMAN
Chief Judge, United States District Court for the Northern District of California.

SHERRILL HALBERT
United States District Judge.

APPENDIX II

Agricultural Code of California, Division V, Standardization*

Section 784. Preparation, etc., of nonconforming fruits, nuts or vegetables. It is unlawful to prepare, pack, place deliver for shipment, deliver for sale, load, ship, transport cause to be transported or sell any fruits, nuts or vegetables in bulk or in any container or subcontainer unless such fruits, nuts and vegetables, and their containers conform to the provisions of this chapter.

Section 785. Abatement of noncomplying fruits, nuts and vegetables.

(Public nuisance: Holding.) Any lot of fruits, nuts or vegetables, including the containers thereof, which is not in compliance in all respects with the provisions of this chapter and rules and regulations issued hereunder is hereby declared to be a public nuisance. Any enforcing officer, if he has reason to believe that any such lot is not in compliance as aforesaid, may hold such lot pending proceedings to condemn and abate such nuisance, as herein provided.

(Warning tag: Detachment, alteration, etc., unlawful.) The officer may affix to any lot so held a tag or notice warning that the lot is held and stating the reasons therefor. It is unlawful for any person other than an authorized enforcing officer to detach, alter, deface or destroy any such tag or notice affixed to any such lot, or to remove or dispose of such lot in any manner or under conditions other than as prescribed in such tag or notice, except upon written permission of an authorized enforcing officer or by order of court.

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*Deering's Agricultural Code of the State of California, 1950 with supplement covering legislation through 1957 session.

(Notice: Contents.) The officer by whom any such lot is held shall cause notice of noncompliance to be served upon the person in possession of said lot. The notice of noncompliance shall include a description of the lot, the place where and the reasons for which it is held, and shall give notice that said lot is a public nuisance and subject to disposal as provided in this section, unless within a specified time said lot shall have been reconditioned or the deficiency otherwise corrected so as to bring said lot into compliance.

(Duty to notify owner.) If the person so served is not the sole owner of the lot, or does not have authority as agent for the owner to bring said lot into compliance, it shall be the duty of such person in writing to notify the officer by whom such lot is held of the names and addresses of the owner or owners and all other persons known to him to claim an interest in said lot. Any person so served shall be liable for any loss sustained by such owner or other person whose name and address he has knowingly concealed from such officer.

If the lot has not been reconditioned or the deficiency otherwise corrected so as to bring said lot into compliance within the time specified in the notice, then the enforcing officer shall cause a copy of said notice to be served upon all persons designated in writing by the person in possession of said lot to be the owner or to claim an interest therein. Any notice required by this section may be served personally or by mail addressed to the person to be served at his last known address.

(Abatement with consent.) The enforcing officer, with the written consent of all such persons so served, is hereby authorized to destroy such lot or otherwise to abate the nuisance. If any such person fails or refuses to give such

consent, then the enforcing officer shall proceed as provided hereinafter.

(Petition for abatement.) If the lot so held is perishable or subject to rapid deterioration, the enforcing officer may file a verified petition in any superior or inferior court of the State to destroy such lot or otherwise abate the nuisance. The petition shall show the condition of the lot, that the lot is situated within the county, that the lot is held, and that notice of noncompliance has been served as herein provided. The court may thereupon order that such lot be forthwith destroyed or the nuisance otherwise abated as set forth in said order.

(Non-perishable lot: Report: Petition: Answer: Determination.) If the lot so held is not perishable nor subject to rapid deterioration, the enforcing officer shall immediately report the condition of said lot to the director. Within five (5) days from the receipt of a report, the director may file a petition in the superior court in the county where the lot is situated for an order to show cause, returnable in five (5) days, why the lot should not be abated. The owner or person in possession on his own motion within five (5) days from the expiration of the time specified in the notice of noncompliance may file a petition in said court for an order to show cause, returnable in five (5) days, why said lot should not be released to petitioner and any warning tags previously affixed removed therefrom. Final determination by said court in either case shall be within a period of not to exceed twenty (20) days from the date said petition was filed.

(Judgment: Sale: Costs deducted.) The court may enter judgment ordering that said lot be condemned and destroyed in the manner directed by the court or relabeled, or denatured or otherwise processed, or sold or released upon such conditions as the court in its discretion may impose to insure that the nuisance will be abated. In the event of sale by order of court, the costs of storage, handling and reconditioning or disposal shall be deducted from the proceeds of sale and the balance, if any, paid into court for the owner. (Amended by Stats. 1953, ch. 680, §2, ch. 752, §1; Stats. 1955, ch. 431, §1.)

Section 7859. *Civil liability of violator: Added penalty: Amount: Value of noncomplying fruits, etc.; defined: Disposition of money recovered.* Any person who violates any provision of this chapter shall, in addition to any penalty otherwise provided, be liable civilly, in an action brought by the director, for a penalty in an amount equal to the value which the fruits, nuts, or vegetables involved in the violation would have if they conformed to the requirements of this chapter. The value of such noncomplying fruits, nuts and vegetables shall be the current market value or lowest priced grade of a marketable commodity of like kind and nature at the time and place of the violation. Any money recovered under this section shall be paid into the Department of Agriculture fund.

Section 790. Fruit, nut and vegetable standards: Establishment. There are hereby established standards for fruits, nuts and vegetables which shall include apricots, avocados, berries, cherries, citrus fruits, dates, grapes, nectarines, peaches, pears, oriental persimmons, plums, and

fresh prunes, "wonderful" pomegranates, quinces, walnuts, artichokes, asparagus, Brussels sprouts, cantaloupes, carrots, cauliflower, celery, green corn, head lettuce, Italian sprouting broccoli, melons, onions, peas, potatoes, sweet potatoes, tomatoes and apples.

Section 792. Avocados.

(Freedom from defects: Tolerance.) Avocados shall be free from all defects, including but not restricted to those hereinafter mentioned, which singly or in the aggregate cause a waste of 10 per cent or more, by weight, of the entire avocado, including the skin and seed. Not more than 5 per cent, by count, of the avocados in any one container or bulk lot may be below the foregoing requirement.

(Definition.) "Defect" includes damage due to insect injuries, freezing injury, decay, rancidity, or other causes.

(Oil content.) All avocados, at the time of picking, and at all times thereafter, shall contain not less than 8 per cent of oil, by weight of the avocado excluding the skin and seed.

Section 831. Violation of chapter: Misdemeanor: Punishment. The violation of any of the provisions of this chapter is a misdemeanor and punishable by a fine of not less than fifty dollars nor more than five hundred dollars, or by imprisonment in the county jail for not more than six months, or by both.

APPENDIX III

Agricultural Marketing Agreement Act of 1937*

7 U.S.C.A. Sec. 601. Declaration of conditions.

It is declared that the disruption of the orderly exchange of commodities in interstate commerce impairs the purchasing power of farmers and destroys the value of agricultural assets which support the national credit structure and that these conditions affect transactions in agricultural commodities with a national public interest, and burden and obstruct the normal channels of interstate commerce. May 12, 1933, c. 25, Title I, §1, 48 Stat. 31; June 3, 1937, c. 296, §§1, 2(a), 50 Stat. 246.

7 U.S.C.A. Sec. 602. Declaration of policy; establishment of base periods for prices; marketing standards

It is declared to be the policy of Congress—

(1) Through the exercise of the powers conferred upon the Secretary of Agriculture under sections 601-608, 608a, 608b, 608c, 608d-612, 613, 614-619, 620, 623, and 624 of this title, to establish and maintain such orderly marketing conditions for agricultural commodities in interstate commerce as will establish, as the prices to farmers, parity prices as defined by section 1301 (a) (1) of this title.

(2) To protect the interest of the consumer by (a) approaching the level of prices which it is declared to be the policy of Congress to establish in subsection (1) of this section by gradual correction of the current level at as rapid a rate as the Secretary of Agriculture deems to be in the public interest and feasible in view of the current

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*The Agricultural Marketing Agreement of June 3, 1937 (7 U.S.C.A. sections 671-674) affirmed the validity of specified sections of the Agricultural Adjustment Act of May 12, 1933. (Historical note, 7 U.S.C.A. page 337.)

consumptive demand in domestic and foreign markets and (b) authorizing no action under sections 601-608, 608a, 608b, 608c, 608d-612, 613, 614-619, 620, 623 and 624 of this title which has for its purpose the maintenance of prices to farmers above the level which it is declared to be the policy of Congress to establish in subsection (1) of this section.

(3) Through the exercise of the powers conferred upon the Secretary of Agriculture under sections 601-608, 608a, 608b, 608c, 608d-612, 613, 614-619, 620, 623, and 624 of this title, to establish and maintain such minimum standards of quality and maturity and such grading and inspection requirements for agricultural commodities enumerated in section 608c(2) of this title, other than milk and its products, in interstate commerce as will effectuate such orderly marketing of such agricultural commodities as will be in the public interest. May 12, 1933, c. 25, Title I, §2, 48 Stat. 32; Aug. 24, 1935, c. 641, §§1, 2, 49 Stat. 750, 782; June 3, 1937, c. 296, §§1, 2(b), 50 Stat. 246, 247; Aug. 1, 1947, c. 425, §1, 61 Stat. 707; July 3, 1948, c. 827, Title III, §302(a), 62 Stat. 1257.

(4) Through the exercise of the powers conferred upon the Secretary of Agriculture under sections 601-604, 605-608a, 608b, 608c, 608d, 608e-1, 608f, 612, 613, 614-619, 620, 623, and 624 of this title, to establish and maintain such orderly marketing conditions for any agricultural commodity enumerated in section 608c(2) of this title, as will provide, in the interests of producers and consumers, an orderly flow of the supply thereof to market throughout its normal marketing season to avoid unreasonable fluctuations in supplies and prices. As amended Aug. 28, 1954, c. 1041, Title IV, §401(a), 68 Stat. 906.

7 U.S.C.A. Sec. 608. Powers of Secretary—Investigations; proclamation of findings

(1) Whenever the Secretary of Agriculture has reason to believe that:

(a) The current average farm price for any basic agricultural commodity is less than the fair exchange value thereof, or the average farm price of such commodity is likely to be less than the fair exchange value thereof for the period in which the production of such commodity during the current or next succeeding marketing year is normally marketed, and

(b) The conditions of and factors relating to the production, marketing, and consumption of such commodity are such that the exercise of any one or more of the powers conferred upon the Secretary under subsections (2) and (3) of this section would tend to effectuate the declared policy of sections 601-608, 608a, 608b, 608c, 608d-612, 613, 614-619, 620, 623, 624 of this title, he shall cause an immediate investigation to be made to determine such facts. If, upon the basis of such investigation, the Secretary finds the existence of such fact, he shall proclaim such determination and shall exercise such one or more of the powers conferred upon him under subsections (2) and (3) of this section as he finds, upon the basis of an investigation, administratively practicable and best calculated to effectuate the declared policy of said sections.

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7 U.S.C.A. Sec. 608b. Marketing agreements; exemption from anti-trust laws

In order to effectuate the declared policy of sections 601-608, 608a, 608b, 608c, 608d-612, 613, 614-619, 620, 623, and 624 of this title, the Secretary of Agriculture

shall have the power, after due notice and opportunity for hearing, to enter into marketing agreements with processors, producers, associations of producers, and others engaged in the handling of any agricultural commodity or product thereof, only with respect to such handling as is in the current of interstate or foreign commerce or which directly burdens, obstructs, or affects interstate or foreign commerce in such commodity or product thereof. The making of any such agreement shall not be held to be in violation of any of the antitrust laws of the United States, and any such agreement shall be deemed to be lawful: *Provided*, That no such agreement shall remain in force after the termination of said section. May 12, 1933, c. 25, Title I, §8(2), 48 Stat. 34; Apr. 7, 1934, c. 103, §7, 48 Stat. 528; renumbered §8b and amended Aug. 24, 1935, c. 641, §4, 49 Stat. 753; June 3, 1937, c. 296, §1, 50 Stat. 246; June 30, 1947, c. 160, Title II, §206(d), 61 Stat. 208.

7 U.S.C.A. 608c. Order regulating handling of commodity—issuance by Secretary

(1) The Secretary of Agriculture shall, subject to the provisions of this section, issue, and from time to time amend, orders applicable to processors, associations of producers, and others engaged in the handling of any agricultural commodity or product thereof specified in subsection (2) of this section. Such persons are referred to in sections 601-608, 608a, 608b, 608c, 608d-612, 613, 614-619, 620, 623 and 624 of this title as "handlers." Such orders shall regulate, in the manner hereinafter in this section provided, only such handling of such agricultural commodity, or product thereof, as is in the current of interstate or foreign commerce, or which directly burdens, obstructs, or affects, interstate or foreign commerce in such commodity or product thereof.

Commodities to which applicable

(2) Orders issued pursuant to this section shall be applicable only to the following agricultural commodities and the products thereof (except canned or frozen grapefruit, the products of naval stores, and the products of honeybees), or to any regional, or market classification of any such commodity or product: Milk, fruits (including filberts, almonds, pecans and walnuts but not including apples, other than apples produced in the States of Washington, Oregon, and Idaho, and not including fruits, other than olives and grapefruit, for canning or freezing), tobacco, vegetables (not including vegetables, other than asparagus, for canning or freezing), soybeans, hops, honeybees and naval stores as included in the Naval Stores Act and standards established thereunder (including refined or partially refined oleoresin). * * *

Notice and hearing

(3) Whenever the Secretary of Agriculture has reason to believe that the issuance of an order will tend to effectuate the declared policy of sections 601-608, 608a, 608b, 608c, 608d-612, 613, 614-619, 620, 623, and 624 of this title with respect to any commodity or product thereof specified in subsection (2) of this section, he shall give due notice of and an opportunity for a hearing upon a proposed order.

Finding and issuance of order

(4) After such notice and opportunity for hearing, the Secretary of Agriculture shall issue an order if he finds, and sets forth in such order, upon the evidence introduced at such hearing (in addition to such other findings as may be specifically required by this section) that the issuance of such order and all of the terms and conditions

thereof will tend to effectuate the declared policy of sections 601-608, 608a, 608b, 608c, 608d-612, 613, 614, 620, 623, and 624 of this title with respect to such commodity.

Milk and its products; terms and conditions of orders

(5) This part of section 608c relates to orders governing milk and its products.

Other commodities; terms and conditions of orders

(6) In the case of the agricultural commodities and the products thereof, other than milk and its products, specified in subsection (2) of this section orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7) of this section), no others:

(A) Limiting, or providing methods for the limitation of, the total quantity of any such commodity or product or of any grade, size, or quality thereof, produced during any specified period or periods, which may be marketed in or transported to any or all markets in the current of interstate or foreign commerce or so as directly to burden, obstruct, or affect interstate or foreign commerce in such commodity or product thereof, during any specified period or periods by all handlers thereof.

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(F) Requiring or providing for the requirement of inspection of any such commodity produced during specified periods and marketed by handlers.

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(H) Providing a method for fixing the size, capacity, weight, dimensions, or pack of the container, or containers, which may be used in the packaging, transportation, sale, shipment, or handling of any fresh or dried fruits, vegetables, or tree nuts: *Provided, however,* That no action taken hereunder shall conflict with the Standard Containers Act of 1916 and the Standard Containers Act of 1928;

(I) Establishing or providing for the establishment of marketing research and development projects designed to assist, improve, or promote the marketing, distribution, and consumption of any such commodity or product, the expense of such projects to be paid from funds collected pursuant to the marketing order.

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Further provisions of section 608c govern the procedure for adoption of marketing agreements, also the administration and enforcement of orders made by the Secretary of Agriculture in carrying out such agreements.